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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF ARIZONA**

10
11 William Leonard Pickard,
12 Plaintiff,
13 v.
14 Department of Justice,
15 Defendant.
16

CV-11-443-TUC-DCB

**MOTION FOR SUMMARY
JUDGMENT; MOTION TO
DISMISS FOR FAILURE TO
EXHAUST ADMINISTRATIVE
REMEDIES**

17 Defendant, United States Department of Justice, through undersigned
18 counsel, respectfully requests that the Court, pursuant to Rule 56(a), grant
19 summary judgment for Defendant. Additionally, Plaintiff's Complaint should be
20 dismissed pursuant to Fed. R. Civ. P. 12(b)(1) based on Plaintiff's failure to
21 exhaust administrative remedies. These motions are based on the attached
22 memorandum of points and authorities and all matters of record.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS

On April 7, 2010, Plaintiff Pickard filed a Freedom of Information Act (FOIA) request with the Drug Enforcement Administration (DEA) seeking “any and all records” pertaining to DEA Agents manual section 6612.13 including eleven risk assessment factors relating to informants, a DEA form utilized in connection with the informant risk assessment, and related risk assessment factors applicable in 2000-2001, “and at any other time.” (Defendant’s Statement of Facts in Support of Motion for Summary Judgment, paragraph 1 (hereafter, “DSOF” followed by the paragraph number).)

The DEA FOIA staff conducted a search of its records from the two offices that would have had responsive materials and sent Plaintiff 20 pages of records. Most of these records had to be hand-searched and files were searched going back to 1998. (DSOF 6 – 9.)

Plaintiff did not file an administrative appeal of DEA’s response to his FOIA request. (DSOF 10.)

II. LAW

A. Summary judgment should be granted for the Defendant because the agency’s record search was thorough and adequate.

Courts typically decide FOIA cases on motions for summary judgment. See *Wickwire Gavin, P.C. v. USPS*, 356 F.3D 588, 591 (4th Cir. 2004) (declaring

1 that FOIA cases are generally resolved on summary judgment); *Cappabianca v.*
2 *Commissioner, U. S. Customs Serv.*, 847 F.Supp. 1558, 1562 (M.D. Fla. 1994)
3 ("once documents in issue are properly identified, FOIA cases should be handled
4 on motions for summary judgment"), *citing Miscavige v. IRS*, 2 F.3d 366, 368
5 (11th Cir. 1993). To be entitled to summary judgment, the agency must prove
6 that each document was produced, not withheld, is unidentifiable, or is exempt
7 from disclosure. *Weisberg v. U. S. Dept. of Justice*, 627 F.2d 365, 368 (D.C. Cir.
8 1980). An agency satisfies the summary judgment requirements in a FOIA case
9 by providing the Court and the plaintiff with affidavits, declarations, or other
10 evidence showing that it has discharged its obligations under the FOIA. *Church*
11 *of Scientology v. U.S. Dept. of Army*, 611 F.2d 738, 742 (9th Cir. 1980). Courts
12 may grant summary judgment solely on the basis of agency affidavits or
13 declarations if they contain reasonably detailed descriptions of the documents
14 and allege facts sufficient to establish that the documents are within the FOIA
15 exemption category. *See Citizens Commission on Human Rights v. FDA*, 45 F.
16 3d 1325, 1329 (9th Cir. 1995); see also *Bowen v. FDA*, 925 F.2d 1224, 1227 (9th
17 Cir. 1995). It is insufficient for a requester to attempt to rebut agency affidavits
18 with purely speculative claims. *See Carney v. Dept. of Justice*, 19 F.3d 807, 813
19 (2nd Cir. 1994); *SafeCard Services v. S.E.C.*, 926 F.2d 1197 at 1200 (D.C. Cir.
20 1991); *Maynard v. CIA*, 986 F.2d 547, 559 560 (1st Cir. 1993).

21 The declaration of William Little makes clear that DEA made a good faith
22 effort to conduct a search for the requested records using methods reasonably
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1 expected to produce the information requested. Paragraphs 13 and 16 through
2 19 of that declaration noted that on July 1, 2011, the agency turned over 20
3 pages responsive to Plaintiff's request, including not only the specific section he
4 requested (§ 6612.13) but also portions of the manual related to that issue. The
5 files of the two offices most likely to have the requested information were
6 searched for responsive materials. (Para. 19).

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8 The fundamental question is not "whether there might exist any other
9 documents possibly responsive to the request, but rather whether the search for
10 those documents was adequate." *Steinberg v. U.S. Department of Justice*, 23
11 F.3d 548, 551 (D.C. Cir. 1994) (*quoting Weisberg v. U.S. Department of Justice*,
12 745 F.2d 1476, 1485 (D.C. Cir. 1984). Thus, "the focus of the adequacy inquiry is
13 not on the results." *Hornbostel v. U.S. Department of the Interior*, 305 F. Supp.
14 2d 21, 28 (D.D.C. 2003), *aff'd*, No. 03-5257, 2004 WL 1900562 (D.C. Cir. Aug.
15 25, 2004); *see Grand Cent. P'Ship v. Cuomo*, 166 F.3d 473, 489 (2nd Cir. 1999)
16 ("[T]he factual question . . . is whether the search was reasonably calculated to
17 discover the requested documents, not whether it actually uncovered every
18 document extant." (*quoting SafeCard Servs. V. SEC*, 926 F.2d 1197 at 1201
19 (D.C. Cir. 1991).)

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21 The facts set forth in the declaration of William Little demonstrate that the
22 agency conducted a thorough and adequate search of its records. Summary
23 judgment should be granted for the Defendant.
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2 *B. Plaintiff's complaint should be dismissed for failure to exhaust his*
3 *administrative remedies.*
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5 The Justice Department regulations pertaining to FOIA requests provide
6 that a person dissatisfied with an FOIA response may appeal the determination to
7 the Office of Information and Privacy (also known as the Office of Information
8 Policy) at the Justice Department. 28 C.F.R. § 16.9. Plaintiff did not appeal the
9 Department's decision to that office. "[E]xhaustion of administrative remedies is a
10 mandatory prerequisite to a lawsuit under FOIA." *Wilbur v. CIA*, 355 F.3d 675,
11 676 (D.C. Cir. 2004). *See also, Almy v. U.S. Department of Justice*, No. 96-1207,
12 1997 WL 267884 at *3 (9th Cir. May 7, 1997) ("[T]he FOIA requires exhaustion of
13 administrative remedies before the filing of a lawsuit.")
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16 Accordingly, Plaintiff's Complaint should be dismissed for failure to
17 administratively appeal the Department's FOIA response.
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20 Respectfully submitted this 2nd day of November, 2012.

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23 District of Arizona

24 s/ Gerald S. Frank
25 Gerald S. Frank
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Original filed and copy of the foregoing
mailed this 2nd day of November, 2012, to:

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s/ Lisa Startup